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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1928 9

No. 686 35

THE STATE OF OHIO ON THE RELATION OF JOHN C. POPOVICI, VICE CONSUL OF ROUMANIA, PETITIONER,

*vs.*

ABRAM W. AGLER, CHARLES KRICHBAUM, AND EDWIN W. DIEHL, JUDGES OF THE COURT OF COMMON PLEAS OF STARK COUNTY, OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1929

CERTIORARI GRANTED MARCH 11, 1929

(33,995)

# (33,995)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1928

# No. 686

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THE STATE OF OHIO ON THE RELATION OF JOHN C. POPOVICI, VICE CONSUL OF ROUMANIA, PETITIONER,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1929

No. 21,357

IN THE SUPREME COURT OF THE STATE OF OHIO.

*Transcript of Docket and Journal Entries.*

TITLE.

The State of Ohio ex rel. of John C. Popovici, Vice Consul of Roumania, 315 Bulkley Bldg., Cleveland, Ohio,

VS.

Abram W. Agler, Charles Krichbaum, Edwin W. Diehl, Judges of the Court of Common Pleas of Stark County, Canton, Ohio.

ACTION.

In Prohibition.

ATTORNEYS.

*For Plaintiff.*

MALCOLM Y. YOST, Cleveland, Ohio.

*For Defendants.*

HARRY NUSBAUM, Canton, Ohio.

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*Memoranda of Pleadings, &c., filed, writs issued, judgments, orders and decrees.*

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1928

Sept. 22. Petition for writ of prohibition filed. Precipe for issuance of summons filed. Fifteen copies of petition filed. Summonses issued for defendants to Sheriff of Stark Co. Ohio, returnable October 1, 1928, sent by registered mail, Post Office receipt No. .....

Oct. 2. Writ returned and filed, endorsed: "Received this writ September 24, 1928, at 10 o'clock A. M. and pursuant to its command, on September 27, 1928, I notified the within named defendant, Abram W. Agler, Judge of the Court of Common Pleas of Stark County, Ohio, by delivering to him personally, a true and certified copy of this writ with all the endorsements thereon, on September 29, 1928. I also notified the within named defendant, Chas. Krichbaum, Judge of the Court of Common Pleas of Stark Co., Ohio by delivering to him personally, a true and certified copy of this writ with all the

endorsements thereon, on September 24, 1928. I also notified the within named defendant, Edwin W. Diehl, Judge of the Court of Common Pleas of Stark County, Ohio, by delivering to him personally, a true and certified copy of this writ with all the endorsements thereon. Fees, $2.07, Edw. Gibson, Sheriff, by H. G. Notter, Deputy."

Oct. 15. Demurrer to petition, briefs on demurrer, (9) and acknowledgment filed.

Oct. 22. Demurrer to petition (3) filed.

Nov. 3. Briefs of relator on demurrer and proof of service filed.

Dec. 26. Demurrer to petition, sustained. Journal 31, p. 518.

Dec. 26. Writ denied. Journal 31, p. 529.

Jan. 2, 1929. Certified copy of entry sent Attorney for Relator.

*Transcript of Journal Entries.*

Wednesday, December 26, 1928. It is ordered by the Court that this demurrer to the petition be and the same is hereby sustained. Journal 31, page 518.

Wednesday, December 26, 1928. This cause came on to be heard upon the demurrer to the petition and was argued by counsel. On consideration whereof it is ordered and adjudged that said demurrer be and the same hereby is sustained, for the reasons stated in the opinion filed in this case. And said relator not desiring to plead further, it is therefore ordered and adjudged that the writ of prohibition prayed for be, and the same hereby is denied.

It is further ordered and adjudged that the relator pay the costs herein, taxed at $....., for which execution is awarded. Journal 31, page 529.

SUPREME COURT OF OHIO

State of Ohio, City of Columbus, ss.

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court. And I further certify that true copies of the petition and demurrer filed in said case No. 21357 State ex rel. Popovici, Vice Consul, etc. v. Abram W. Agler, et al., are hereto attached, together with the briefs on said demurrer.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 7th day of January, A. D. 1929.

SEBA H. MILLER,

(Seal) *Clerk of Supreme Court of Ohio.*

---

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,
vs.
ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

*Petition for Prohibition.*

MALCOLM Y. YOST,
Engineers National Bank Bldg.,
Cleveland, Ohio,
*Attorney for Relator.*

---

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,
vs.
ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

*Petition for Prohibition.*

(Filed in the Supreme Court Sept. 22, 1928.)

Relator herein for his cause of action says that he is vice-consul for the Kingdom of Roumania, being duly accredited by the Government of the Kingdom of Roumania, to the Government of the United States, and

having been duly and regularly recognized and accepted by the Government of the United States as Vice-Consul of Roumania, and being stationed by the Roumanian Legation, at Cleveland, Ohio, where he is now residing and representing said Roumanian Government, as vice-consul. And relator further says that at all times hereinafter set forth in this petition, he was representing said Roumanian Government as vice-consul aforesaid. That relator is an alien and a citizen of the Kingdom of Roumania. That said defendants are Judges of the Court of Common Pleas of Stark County, Ohio.

Relator further says that on the 26th day of May, A. D., 1927, he was summoned, at the suit of Helen Popovici, to answer in the Court of Common Pleas of Stark County, Canton, Ohio, said Court being presided over by said defendants. That said action which relator was summoned to answer is an action in the nature of divorce and alimony, and bears the number 50050 in said Court of Common Pleas. That in response to said summons, relator appeared in said Court and objected to and denied its jurisdiction in said action.

Relator further says that said Court has no jurisdiction whatsoever of said case, by reason of Article 3, Section 2, of the Constitution of the United States as follows:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

and by reason of Section 258 (8) of the United States Judicial Code, U. S. Compiled Statutes of 1918, Section 1233 as follows:

> "The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states.

(8) In all suits and proceedings against ambassadors or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls."

Relator further avers that, in spite of said Constitution and Laws of the United States of America, defendants overruled the objection of this relator and proceeded to enter against him an order for temporary alimony, and unless prohibited from so doing, will restrain relator of his liberty, by means of contempt proceedings, and will proceed to hear and determine said action, although said Court of Common Pleas has no jurisdiction whatsoever in said action, and any judgments or orders issued thereon are null and void. That relator never, at any time, waived the lack of jurisdiction of said Court, nor consented to, or submitted to its jurisdiction, but always has denied and continues to deny that said Common Pleas Court of Stark County, has any jurisdiction whatsoever to hear said proceedings or to issue any decrees, orders or judgments pursuant thereto.

Relator says that he has no adequate remedy at law, that error proceedings or appeal proceedings in said original action will furnish him with no relief, inasmuch as said Common Pleas Court will commit him for contempt pending such error proceedings or appeal, and restrain him of his liberty, although without jurisdiction in said action.

WHEREFORE, your relator prays that a writ of prohibition may be issued from this Court prohibiting said defendants from trying said cause, and from executing or enforcing any decrees, judgments or orders heretofore entered therein against this relator, and generally from any further exercise of jurisdiction in said cause.

MALCOLM Y. YOST,
*Attorney for Relator.*

State of Ohio, Cuyahoga County, ss.

JOHN C. POPOVICI, being first duly sworn, says that he is the relator herein, and that the statements and allegations in the foregoing petition contained, are true as he verily believes.

JOHN C. POPOVICI.

Sworn to and subscribed before me this 17th day of September, A. D. 1928.

HARRY F. PATTIE,
*Notary Public.*

(Seal)

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No. .....

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

*Precipe.*

*To the Clerk of Supreme Court:*

Please issue summons with alternative writ in the above entitled action, addressed to the Sheriff of Stark County, Ohio, and returnable according to law. Endorse thereon "Action in Prohibition."

M. Y. YOST,
*Attorney for Relator.*

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
Relator,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

*Demurrer to Petition.*

The respondents, Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, as Judges of the Court of Common Pleas, Stark County, Ohio, demur to the petition for a writ of prohibition herein for the reason and because:

First. That the petition herein does not state facts to constitute a cause of action.

Second. That the said petition does not set up facts sufficient to entitle the plaintiff to the writ prayed for.

Third. That the petition is wholly insufficient in law to justify this court to hear, try, and determine the matter involved.

Wherefore these respondents having shown cause, ask for a dismissal of the petition with costs.

Respectfully submitted,

HARRY NUSBAUM,
*Attorney for Respondents.*

No. 21,357.

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL. JOHN C. POPOVICI,
Vice Consul of Roumania,
Relator,

VS.

ABRAM W. AGLER, CHARLES KRICHBAUM and
EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
Defendants.

*Opinion of the Supreme Court of Ohio.*

Inasmuch as the federal courts has disclaimed altogether any jurisdiction upon the subject of divorce or for the allowance of alimony either as an original proceeding in chancery or as an incident to a divorce, prohibition will not lie to prevent the courts of this state which have jurisdiction of the subject-matter of divorce and alimony, from hearing and determining a suit for divorce or alimony or both against a consular representative accredited by a foreign government to the government of the United States and recognized and accepted by the government of the United States, who is stationed in the state of Ohio.

(No. 21357—Decided December 26, 1928)

In Prohibition

The facts are stated in the opinion.

MR. MALCOLM Y. YOST, *for relator.*

MR. HARRY NUSBAUM, *for defendants.*

MARSHALL, *C. J.*

This suit was filed in this court invoking the original jurisdiction of the court, praying a writ of prohibition to prohibit the defendants from trying a cause pending in the Court of Common Pleas of Stark County, Ohio. The petition recites that Popovici is a vice consul for the kingdom of Roumania, duly accredited by the government of the kingdom of Roumania to the government of the United States, and recognized and accepted

by the government of the United States as such vice consul, and that he is stationed by the Roumanian legation at Cleveland, Ohio, where he now resides and represents said Roumanian government as vice consul. It further recites that he is an alien and a citizen of the kingdom of Roumania.

It is further recited that on May 26, 1927, Helen Popovici his wife filed a suit in the Common Pleas Court of Stark County, Ohio, praying divorce and alimony. Relator as defendant in that cause objected to the jurisdiction of the court, but the court overruled the objection and made an order for temporary alimony, and, according to the allegations of the petition, will, unless restrained by this court, enforce that order by contempt proceedings, with possible restraint of his liberty. Though it was not alleged in the petition, it was conceded as a fact during the argument of this cause that Helen Popovici was at the time of the marriage a resident of Stark County, Ohio, and that the marriage was contracted and consummated in Canton, Stark County, and that the marriage therefore acquired a legal domicile in that county. The proceedings were regular in all respects and except for the official position of relator as a vice consul no question would arise.

Relator claims the protection of Section 2 of Article III of the Constitution of the United States, which provides, in part, as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls * * *.
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

These are the only provisions found in the federal constitution having any bearing upon this subject.

He also invokes the aid of paragraph 8 of Section 256 of the United States Judicial Code, Section 1233 U.

S. Compiled Statutes of 1918, as amended March 3, 1911, as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States; * * *
>
> "Eight. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls."

In any ordinary action against the accredited representatives of a foreign government, relating to causes over which federal courts have well recognized jurisdiction, and where they are in fact exercising such jurisdiction, it is not doubted that Section 256 of the Judicial Code, or any other enactment on that subject which congress has the constitutional authority to enact, would be controlling, and entirely exclude jurisdiction of the state courts. It may be doubted whether congress would have the power to confer upon the federal courts exclusive jurisdiction, or any jurisdiction, over causes in which the domestic relations are involved. It has been definitely and repeatedly decided by the federal courts that under existing legislation those courts may not entertain jurisdiction over causes affecting the domestic relations. The earliest declaration, upon that subject is found in *Barber v. Barber,* 21 Howard 582:

> "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo,* or to one from bed and board."

That case was decided in 1858. There was a divided court, but the members of the court at that time differed only upon the grounds of rejecting the jurisdiction, they being unanimously of the opinion that jurisdiction could not be entertained of that class of cases. In 1882 the Circuit Court of the Southern District of New York, in *Johnson v. Johnson,* 13 Fed. 193, remanded of its own motion a divorce case which had been removed to that court from the state court. The Circuit Court of the Northern District of Illinois took similar action in the case of *Bowman v. Bowman,* 30 Fed. 849. The same doctrine was applied in *The Case of Burrus,* 136 U. S. 586, in which a writ of habeas corpus was applied for to

restore a son to the custody of his father, unlawfully detained by his grandparents. Mr. Justice Miller declared in the opinion, at page 593:

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."

In *Simms v. Simms,* 175 U. S. 162, the court had under consideration an appeal from a decree of the Supreme Court of the territory of Arizona. While the court in that case entertained jurisdiction of an appeal from the territorial court, Mr. Justice Gray, in the opinion, at page 167, made the following observation:

> "In support of the motion to dismiss this appeal because the decree below concerned divorce and alimony only, the appellee relied on *Barber v. Barber,* 21 How. 582. In that case, a majority of this court held that a wife who had obtained against her husband, in the courts of the State of their domicile, a decree, divorcing them from bed and board and awarding alimony to her, might sue the husband for such alimony in a Circuit Court of the United States held in a State in which he had since become domiciled. Mr. Justice Wayne, in delivering judgment, said: 'We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce *a vinculo,* or to one from bed and board.' 21 How. 584. And from that proposition there was no dissent. It may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States. *In re Burrus,* 136 U. S. 586, 593, 594."

In *De la Rama v. De la Rama,* 201 U. S. 303, a similar declaration was made by Mr. Justice Brown, at page 307 of the opinion.

If any further citation of authority is necessary to be shown to establish the principle that the federal courts will not entertain jurisdiction of divorce and alimony cases, that authority may be found in the experience of Helen Popovici. She brought her action in the District Court of the United States for the northern district of Ohio, and a motion to dismiss was filed by relator in this case, and, after full consideration, and rendering an elaborate opinion, the court dismissed the petition on the ground that it had no jurisdiction over an action for divorce and alimony. It would seem, therefore, that if the state courts cannot entertain jurisdiction of this cause Mrs. Popovici has one of two alternatives, either to continue to occupy the status of a deserted wife, with the attendant obligation of rearing, supporting and educating her infant child, or to go to Roumania and invoke the jurisdiction of the courts of that kingdom to obtain a legal separation, and support for herself and child. The federal constitution did not definitely and in terms give to the federal courts exclusive jurisdiction over all controversies in which a foreign representative is a party. It provided that the jurisdiction of the federal courts should extend to such causes, and further that the Supreme Court of the United States should have original jurisdiction. In neither event was it declared to be exclusive. It was left to congress to determine to what extent the jurisdiction should be made exclusive, and, acting upon the authority given, congress in the judicial act of September 24, 1789, gave to the district courts of the United States exclusive jurisdiction of all suits against consuls, except in certain instances with which we are not now concerned. In *Davis v. Packard*, 7 Peters 276, it was held that that portion of the act was constitutional. The law remained unchanged until the act of February 18, 1875, whereby that portion of the earlier act was repealed, and for thirty-seven years there was no statutory provision which in terms made the jurisdiction of the courts of the United States exclusive of the state courts in suits against consuls or vice consuls. The act of March 3, 1911, again restored the exclusive jurisdiction of the district courts of all civil cases against consuls. Since March 3, 1911, it is unquestioned that the jurisdiction of the federal courts is exclusive of the jurisdiction of state courts in all causes affecting consuls, in so far as the federal courts themselves have jurisdiction over the subject-matter of the controversies. Our sole inquiry in the instant case is

whether the state courts are excluded from jurisdiction over those controversies affecting ambassadors, other public ministers and consuls, where the federal courts disclaim jurisdiction entirely. It is at least significant that congress, having the right to assert exclusive jurisdiction in the federal courts, did not exercise that right for a period of thirty-seven years. It is equally significant that congress has not at any time established a special court, or given jurisdiction to the district courts over causes involving domestic relations affecting foreign ministers and consuls. Whether this omission has been due to a willingness to leave all matters affecting the domestic relations to the state courts, or whether the omission is for the reason that such jurisdiction would be an unconstitutional usurpation of power, we need not at this time inquire. It is sufficient to say that at this time Mrs. Popovici is wholly without redress, unless her cause can be heard and decided by the courts of this state. The constitutional provision had its origin in the law of nations, and, while its wisdom is undoubted, there must necessarily be some limitations upon its application. That there are certain well-defined limitations and exceptions is fully established by the authorities. Unfortunately no cause has ever come before the federal courts involving the right of a state court to hear and decide a suit for divorce and alimony affecting a foreign consul. In the instant case it must be borne in mind that an alien took up his abode in the city of Canton, contracted marriage with a resident of Ohio, with the incidental obligations which that marriage involved, including support of wife and support, maintenance and education of a child. The wife and child are not only the beneficiaries of those obligations, but by reason of the breach of the marriage contract she is entitled to the restoration of her former status so far as lies in the power of the courts to grant. The relator having invoked the laws of Ohio to contract a valid marriage should not lightly be heard to deny the right of the other party to the contract to invoke the remedial laws of the same state to compel the performance of the obligations of that contract. If relator is entitled to immunity from a divorce suit in the state courts, the privilege is one which belongs to his home government, and is one which he cannot waive, and even though he should neglect to assert it in the first instance he would not be estopped from asserting it at any time before the litigation is ended. We are of the opinion, however,

that there is no such immunity in this character of controversy. The immunity exists if at all only by virtue of the constitutional provision and the acts of congress relating thereto. The United States Supreme Court in *Plaquemines Tropical Fruit Co. v. Henderson,* 170 U. S. 511, referring to this constitutional provision has said, at page 517:

> "It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. * * * If it was intended to withdraw from the states authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states."

The language of paragraph 8 of Section 256 of the United States Judicial Code is in clear language, and yet it must be said that congress has not by that very clear language clearly manifested the legislative intent. The general intent of congress upon this entire subject is manifested by what is done and omitted rather than by what is said. By its omission to make any provision for the trial of divorce and alimony suits against foreign consuls in the federal courts it has manifested an intent and purpose to leave such controversies to the courts of the states.

The writ must be denied.

*Writ denied.*

DAY, ALLEN, KINKADE, ROBINSON, JONES and MATTHIAS, *JJ.*, concur.

Columbus, Ohio, Dec. 29th, 1928.

I hereby certify that the foregoing is a true and correct copy of the opinion in case No. 21357, The State of Ohio, ex rel. John C. Popovici, Vice Consul of Roumania, relator, v. Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, Judges of the Court of Common Pleas, Stark County, Canton, Ohio, as the same is on file in this office; but the same is subject to revision and addition by the Judges until published in the official report.

J. L. W. HENNEY,
*Reporter of the Supreme Court.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 11, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY No. ... 35

FILE
FEB 8 1
CHARLES ELMORE

# In the Supreme Court of the United States

OCTOBER TERM, 1928.

THE STATE OF OHIO on the relation of John C. Popovici, Vice-Consul of Roumania,

*Petitioner,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM AND EDWIN W. DIEHL, Judges of the Court of Common Pleas of Stark County, Ohio,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI, and BRIEF IN SUPPORT OF PETITION.

MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,

*Counsel for Petitioners.*

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No. .....

# In the Supreme Court of the United States

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OCTOBER TERM, 1928.

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THE STATE OF OHIO on the relation of John C. Popovici, Vice-Consul of Roumania,

*Petitioner,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM AND EDWIN W. DIEHL, Judges of the Court of Common Pleas of Stark County, Ohio,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI.

---

The petition of the State of Ohio on the relation of John C. Popovici, Vice-Consul of Roumania, for a writ of certiorari directed to the Supreme Court of the State of Ohio to bring before this Honorable Supreme Court of the United States the case of:

The State of Ohio ex rel. John C. Popovici,
Vice-Consul of Roumania,
*Petitioner,*

vs.

Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, Judges of the Court of Common Pleas, of Stark County, Ohio,
*Respondents.*

---

No. 21357, in prohibition, on the docket of said Supreme Court of Ohio.

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*To the Honorable the Supreme Court of the United States:*

Your petitioner, The State of Ohio, on the relation of John C. Popovici, Vice-Consul of Roumania (hereinafter called the "Vice-Consul") hereby prays for a writ of certiorari directed to The Supreme Court of the State of Ohio to review the final order and judgment of said court in said cause, entered on the 26th day of December, 1928.

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

In support of this petition, your petitioner respectfully represents and shows the Court:

1. That this is a suit in prohibition begun by the petitioner filing a petition in the Supreme Court of Ohio on the 22nd day of September, 1928, praying for a writ of prohibition from said court to prohibit and restrain respondents from issuing or enforcing any judgment, decree or order, or from exercising any jurisdiction in a certain action for divorce and alimony brought against the Vice-Consul by Helen Popovici, in the Court of Common Pleas

of Stark County, Ohio, said respondents being the judges of said court (R. 3).

2. The grounds upon which the writ of prohibition was demanded were as follows:

A. The facts set forth in said petition were briefly that petitioner is Vice-Consul of the Kingdom of Roumania, having been duly and regularly appointed to said office by the Kingdom of Roumania, and having been recognized and accepted by the United States Government as Vice-Consul of Roumania, and being stationed at Cleveland, Ohio; that petitioner is an alien and citizen of Roumania; that on May 26, 1927, petitioner was summoned to answer the action of Helen Popovici, brought against him in the Court of Common Pleas of Stark County, Ohio; that said action was a suit for divorce and alimony; that petitioner always objected to, and denied the jurisdiction of said Common Pleas Court of Stark County, in said action (R. 4).

B. Petitioner further alleged in his petition that said Common Pleas Court had no jurisdiction of said cause by reason of Article III, Section 2, of the Constitution of the United States, as follows (R. 4):

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority: *to all cases affecting ambassadors, other public ministers, and consuls*: * * *."

and by reason of Section 256, paragraph 8 of the United States Judicial Code; Section 1233, U. S. Compiled Statutes of 1918, as amended March 3, 1911; United States Code, Title 28, Section 371, as follows:

"The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, *shall be exclusive* of the Courts of the several states. * * *

(8) In *all* suits and proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, or *against consuls or vice-consuls.*"

C. Petitioner further sets forth in his petition that said Common Pleas Court overruled his objection to its jurisdiction and proceeded to enter a judgment for temporary alimony against him, and unless prohibited therefrom, will restrain petitioner of his liberty and jail him in contempt proceedings for non-payment of alimony, although said Court had and has no jurisdiction whatever of petitioner, and all of its orders and judgments are null and void (R. 5).

3. Respondents filed a general demurrer to said petition for a writ of prohibition, alleging that (a) said petition does not state facts sufficient to constitute a cause of action, (b) that said petition does not set up facts sufficient to entitle plaintiff to the writ prayed for, (c) that the petition is wholly insufficient in law to justify the court to entertain, hear, try, and determine the matter involved (R. 7).

4. The Supreme Court of Ohio, on the 26th day of December, 1928, sustained the demurrer of respondents to said petition and denied the writ of prohibition (R. 14).

5. The grounds upon which this decision of the Supreme Court of Ohio was based were purely legal. The Supreme Court of Ohio based its decision solely upon an interpretation of Article III, Section 2 of the Constitution of the United States, and Section 256, paragraph 8 of the United States Judicial Code contrary to the contentions of petitioner. No question was raised by the Supreme Court

of Ohio as to the remedy or the right of petitioner to have a writ of prohibition in this action, should said Common Pleas Court be without jurisdiction. (Supreme Court of Ohio, Opinion, R. 8 to 14.)

**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

1. Said Supreme Court of Ohio, the highest court thereof, has decided and determined a federal question of substance, that the state courts of Ohio have jurisdiction of actions for divorce against vice-consuls of foreign sovereigns resident in Ohio, contrary to the express exclusion of such actions from the jurisdiction of state courts by Section 256, paragraph 8 of the United States Judicial Code, in a way not in accord with the applicable decisions of this Court.

2. Said Supreme Court of Ohio has interpreted Section 256, paragraph 8 of the United States Judicial Code contrary to Article III, Section 2 of the Constitution of the United States and law.

3. Said Supreme Court of Ohio has interpreted a United States statute (Section 256, paragraph 8 of the United States Judicial Code) directly contrary to the interpretation of the same by the courts of two other states (New York and Pennsylvania).

4. Your petitioner specially set up and claimed in said action in said Supreme Court of Ohio a right, privilege and immunity under the Constitution and the statutes of the United States, which was denied him by said court. (Section 237 (b) of the United States Judicial Code.)

5. Unless this petition is granted, the Vice-Consul is threatened with contempt proceedings in said Common Pleas Court for refusing to recognize the jurisdiction of said court and is in danger of being restrained of his

liberty contrary to the Constitution and statutes of the United States.

6. Said Supreme Court of Ohio has erred in this action and a situation of great public interest has been created.

**PRAYER.**

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Ohio, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 21357, the State of Ohio on the relation of John C. Popovici, Vice-Consul of Roumania, petitioner, vs. Abram W. Agler, Charles Krichbaum and Edwin W. Diehl, Judges of the Court of Common Pleas of Stark County, Ohio, respondents, and that said order and judgment of the Supreme Court of the State of Ohio may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

STATE OF OHIO ON THE RELATION OF
JOHN C. POPOVICI,

By MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,
*Counsel for Petitioner.*

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and one in which the prayer of the petitioner should be granted by this Court.

MALCOLM Y. YOST,
ATLEE POMERENE,
FRANK HARRISON,
*Of Counsel for Petitioner.*

No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1928.

THE STATE OF OHIO on the relation of John C. Popovici, Vice-Consul of Roumania,

*Petitioner,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM AND EDWIN W. DIEHL, Judges of the Court of Common Pleas of Stark County, Ohio,

*Respondents.*

## BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

### THE OPINION OF THE SUPREME COURT OF OHIO.

The opinion of the Supreme Court of Ohio has not been officially reported but is dated December 26th, 1928, and it is quoted in full in the record filed herewith at pages 8 to 14.

### JURISDICTION OF THIS COURT.

The date of the order and judgment to be reviewed is December 26, 1928 (R. 8).

Petitioner claimed in the proceeding in the Supreme Court of Ohio that under Article III, Section 2 of the Constitution of the United States and Section 256, Paragraph 8 of the United States Judicial Code, the respond-

ents, judges of the Court of Common Pleas of Stark County, Ohio, had no jurisdiction to entertain the suit of Helen Popovici against petitioner for divorce, or to order petitioner to pay said Helen Popovici temporary alimony, as said Court of Common Pleas had assumed and had proceeded to do and order (R. 4). The reason given in the opinion of the Supreme Court of Ohio for overruling the claim of petitioner and sustaining the demurrer of the respondents was that there should be read into Section 256 of the United States Judicial Code by interpretation, a provision that if no remedy existed in the federal courts, the state courts should have jurisdiction (R. 14). The opinion finds that no remedy in the federal courts exists and that it is proper to interpret a United States statute as aforesaid (R. 14).

The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the United States Judicial Code, as amended by the Act of February 13th, 1925, 43 Stats., 938.

The right of the Supreme Court to grant this petition and to issue the writ of certiorari prayed for is so plain, that we cite but a few applicable decisions.

*Weston v. City Council,* 2 Pet. 449 (1829);
*Davis v. Packard,* 8 Pet. 312 (1834);
*Duck Co. v. Power Co.,* 240 U. S. 30 (1916);
*Railroad Co. v. Railroad Com.,* 240 U. S. 564 (1916);
*Missouri v. Taylor,* 266 U. S. 200 (1924).

## STATEMENT OF THE CASE.

A full statement of the case has been given in the petition and, in the interest of brevity, the statement is not repeated at this point. (See pp. 2 to 6, *supra.*)

## SPECIFICATION OF ERRORS.

The petitioner intends to urge the following errors of the Supreme Court of Ohio, and the following grounds for reversing the order and judgment of the Supreme Court of Ohio:

1. The Supreme Court of Ohio erred in finding and holding that the Court of Common Pleas of Stark County, Ohio, has, or at any time had, jurisdiction to entertain the suit of Helen Popovici against the Vice-Consul for divorce and alimony, or to order the Vice-Consul to pay her temporary alimony, *pendente lite.*

2. The Supreme Court of Ohio erred in finding and holding that the Constitution of the United States and Section 256, Paragraph 8 of the United States Judicial Code does not deprive state courts courts of jurisdiction of divorce proceedings against vice-consuls.

3. The Supreme Court of Ohio erred in sustaining the demurrer of the respondents to the petition of the petitioner for writ of prohibition.

## SUMMARY OF THE ARGUMENT.

**Point I.** Under Article III, Section 2 of the Constitution of the United States, Section 256 of the United States Judicial Code is constitutional;

**Point II.** Section 256, Paragraph 8 of the United States Judicial Code, gives jurisdiction to the courts of the United States and excludes jurisdiction of state courts in all suits and proceedings against vice-consuls, including actions and proceedings for divorce and alimony, or for temporary alimony. The statute is so clear and unambiguous that it should not be altered by interpretation so as to be held not to cover divorce and alimony proceedings and actions. If no remedy exists in the federal courts it

is because Congress in its discretion has not desired to provide a remedy, and it would not justify an alteration of the statute by judicial interpretation.

## ARGUMENT.

### POINT I. UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES, SECTION 256 OF THE UNITED STATES JUDICIAL CODE IS CONSTITUTIONAL.

Article III, Section 2 of the Constitution quoted, *supra*, page 3 extends the judicial power of the courts of the United States to all cases in law or equity of a certain specified nature or between certain specified parties. The cases thereby covered are peculiarly federal, because unless the courts of the United States were given jurisdiction, the states would have power to dismember the Union and render its purpose futile.

Section 256 of the United States Judicial Code carries that section of the Constitution into effect and does not exceed the constitutional grant. It is, therefore, authorized by the Constitution and is constitutional.

*Martin v. Hunters Lessee*, 1 Wheat. 306 (1816);
*Plaquemines v. Henderson*, 170 U. S. 511, 517.

In this latter case it is said in the opinion of the court, page 517:

> "It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction.
>
> "If it was intended to withdraw from the states authority to determine by its courts, all cases and controversies to which the judicial power of the United

States was extended, *and of which jurisdiction was not given to the national courts exclusively,* such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; *leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states.*"

The Supreme Court of Ohio does not, in its opinion, question the constitutionality of Section 256 of the United States Judicial Code.

**POINT II. SECTION 256 PARAGRAPH 8 OF THE UNITED STATES JUDICIAL CODE GIVES JURISDICTION TO THE COURTS OF THE UNITED STATES OF ALL SUITS AND PROCEEDINGS AGAINST VICE-CONSULS AND EXCLUDES STATE COURTS FROM JURISDICTION OF ACTIONS FOR DIVORCE AGAINST VICE-CONSULS.**

Paragraph 8 of Section 256 of the United States Judicial Code, quoted, *supra*, page 3, provides that the jurisdiction of the courts of the United States shall be exclusive of the courts of the several states in all suits and proceedings against vice-consuls. There is no more comprehensive term than "all." All means "every." Certainly an action for divorce is a proceeding and suit. A proceeding or action for divorce or alimony against a vice-consul is therefore one which is excluded from the jurisdiction of the courts of the several states.

The language of Section 256 and Paragraph 8 thereof of the United States Judicial Code is so clear and unambiguous that there is no room for judicial interpretation. Nevertheless the Supreme Court of Ohio proceeds in its opinion to interpret it as not excluding state courts of juris-

diction of divorce proceedings. The only reason assigned by the Supreme Court of Ohio in its opinion is based upon the assumption that otherwise the wife of a vice-consul would have no forum in which she could obtain such relief.

Even if the conclusion of the Supreme Court of Ohio were correct, that if state courts have no jurisdiction of divorce proceedings against vice-consuls, the wives of vice-consuls have no forum in which to obtain relief, that is no justification for judicial legislation adding to such a clear and unambiguous federal statute as Section 256 of the United States Judicial Code. Since the statute is constitutional and within the powers of Congress, the courts have no right to question its wisdom. Hardship, under statutes, within the power of Congress to enact, has been many times held by this Court to constitute no reason for judicial legislation.

*Ladew v. Tennessee Copper Co.*, 179 Fed. 215 (Affirmed 218 U. S., 357 and 369), Opinion page 252:

> "*The construction and interpretation of statutes cannot extend to amendment or legislation. U. S. v. Fisk*, 3 Wall. 445, 448, 18 L. Ed. 243; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281. *Nor can considerations of hardship justify a strained construction of the law as written. Jos. Schlitz Brewing Co. v. U. S.*, 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. 'The remedy, if any be required, is in Congress.' *Ex-parte Girard*, 3 Wall. Jr., 263, 10 Fed. Cas. 436, Fed. Cas. No. 5,457."

The reasons which prompted the framers of the Constitution to extend the judicial power of the United States to all cases affecting ambassadors and consuls, apply to divorce proceedings against ambassadors and consuls just as much as to other suits and proceedings. A vice-consul is a representative of a sovereign of equal dignity with the

United States. The foreign sovereign thus represented may have peculiar laws relating to domestic relations. It is the right of that sovereign under principles of comity between nations to have its representatives free from embarrassment by any kind of a suit or proceeding in the land of the host. No state court should have the power to draw the United States into complications with a foreign sovereign and such complications might result from a divorce proceeding just as readily as from any other kind of a suit or proceeding.

This Court long ago decided that consular representatives are exempt from all suits and proceedings in the state courts. *Davis v. Packard,* 7 Pet. 276 (1834). The decision in that case was under an earlier form of this same statute which only differs from the present statute in that its excepted a few specific criminal matters. It is said in the opinion of this Court in that case:

> (Page 280) "As an abstract question it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls."
>
> (Page 285) "The act of Congress is general, extending to *all* suits against consuls."

At page 283 of the opinion the court held that the privilege and immunity is not personal to the consul, but is a privilege of the government which he represents. The Court of Appeals of New York in the *Valario* case cited below, held it is also a privilege of the Government of the United States. It is a privilege which he cannot waive.

This question has been decided by the courts of New York and Pennsylvania contrary to the opinion and decision of the Supreme Court of Ohio in this cause.

In *Higginson v. Higginson,* 158 N. Y. Sup. 92, it was held that under this act of Congress the courts of New York have no jurisdiction over an action for separation brought

by the wife of the consul for the Republic of Peru against the consul in a New York court.

The reasons for excluding state courts from jurisdiction over consuls and other representatives of foreign governments is ably stated by the highest court of New York in the case of *Valario v. Thompson,* 7 N. Y., 576, where in the opinion at page 580, it is said:

> "The object of this exclusion was to keep within the control of the federal government, and subject to the authority of its courts, all cases and contingencies which might in any degree affect our foreign relations. The United States Government has an interest in maintaining this exclusive jurisdiction for the purpose of preventing it from being involved in controversies with foreign powers without its consent and for acts not its own. But this is a matter of internal regulation between the general government and the several states, over which foreign governments have no control. The exemption of a consul from liability to be sued in a state court, if it can be called a privilege, is not the privilege of the consul or his government, but of the United States Government; and therefore it cannot be renounced by the consul."

A Pennsylvania court has also held that the state courts of that state have no jurisdiction in suits and proceedings against consuls and vice-consuls. *Mannhardt v. Soderstrom,* 4 Binney 138. We also rely upon:

*Sagory v. Wissman* (D. C. N. Y. 1868), Fed. Cas. No. 12227;

*Griffin v. Domingues,* 9 N. Y. Super. Ct. (2 Duer) 656 (1853);

*Sartori v. Hamilton,* 13 N. J. Law (1 J. G. Green) 107 (1832);

*Opinions of Attorney-General of the United States,* V. 1, page 406, (1820).

**CONCLUSION.**

Thus it appears that the Supreme Court of Ohio has decided a federal question of substance contrary to the constitution and laws of the United States. The question was presented in the pleadings and passed upon in the opinion of the court contrary to the contentions of the petitioner. Unless this Court reviews said decision of the Supreme Court of Ohio, the rights, privileges and immunities of the Vice-Consul under the constitution and laws of the United States will be jeopardized. The interpretation of Section 256, Paragraph 8 of the United States Judicial Code will not be uniform throughout the United States. International complications might result. The cause, therefore, presents a question of great public and general interest. We, therefore, respectfully submit that the prayer of the petitioner should be granted.

MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,
*Counsel for Petitioner.*

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No. 35.

SEP 14
CHARLES ELMO

# In the Supreme Court of the United States

OCTOBER TERM, 1929.

THE STATE OF OHIO, *ex rel.*
JOHN C. POPOVICI, Vice-Consul of Roumania,
*Appellant,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM and
EDWIN W. DIEHL,
Judges of the Court of Common Pleas
of Stark County, Ohio,
*Appellees.*

## BRIEF FOR APPELLANT.

MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,
*Counsel for Appellant.*

No. 35.

# In the Supreme Court of the United States

October Term, 1929.

The State of Ohio, *ex rel.*
John C. Popovici, Vice-Consul of Roumania,
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vs.

Abram W. Agler, Charles Krichbaum and
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Judges of the Court of Common Pleas
of Stark County, Ohio,
*Appellees.*

## BRIEF FOR APPELLANT.

Malcolm Y. Yost,
Squire, Sanders & Dempsey,
Atlee Pomerene,
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vs.

ABRAM W. AGLER, CHARLES KRICHBAUM and
EDWIN W. DIEHL,
Judges of the Court of Common Pleas
of Stark County, Ohio,
*Appellees.*

## BRIEF FOR APPELLANT.

### STATEMENT OF THE CASE.

John C. Popovici is Vice-Consul of Roumania and is stationed at Cleveland, Ohio. On May 26, 1927, Helen Popovici commenced an action in the Court of Common Pleas of Stark County, Ohio for divorce and alimony and over objection by appellant to the jurisdiction of that Court, it entered an order against him for temporary alimony *pendente lite*. On September 22, 1928 this suit was begun in the Supreme Court of Ohio praying for a writ of prohibition from said Court to prohibit and restrain the appellees, Judges of the Court of Common Pleas of Stark County, Ohio from issuing and enforcing any judgment, decree or order, or from exercising any jurisdiction in said action for divorce and alimony. (R. 1, 3-5.) The appellees filed a general demurrer to said petition (R. 2, 7) upon the grounds

(a) That said petition does not state facts sufficient to constitute a cause of action;

(b) That said petition does not set up facts sufficient to entitle plaintiff to the relief prayed for, and

(c) That said petition is wholly insufficient in law to justify the Court to entertain, hear, try and determine the matter involved.

On the 26th of December, 1928, the Supreme Court of Ohio sustained the demurrer to said petition and denied the writ of prohibition. (R. 2.) Thereafter appellant petitioned this Court for a writ of certiorari which was allowed.

The petition for the writ of prohibition sets forth (R. 3-5) that said John C. Popovici is Vice-Consul of the Kingdom of Roumania, having been duly and regularly appointed to said office by the Kingdom of Roumania, and having been recognized and accepted by the United States Government as such; that he is stationed at Cleveland, Ohio; that he is an alien and citizen of Roumania; that on May 26, 1927, he was summoned to answer the action of Helen Popovici brought against him in the Court of Common Pleas of Stark County, Ohio, for divorce and alimony; that he always objected to and denied the jurisdiction of said Court of Common Pleas in said action; that said Court of Common Pleas had no jurisdiction of said cause by reason of Article III, Section 2 of the Constitution of the United States, and by reason of Section 256, paragraph 8 of the United States Judicial Code; that said Court of Common Pleas overruled his objection to its jurisdiction and proceeded to enter a judgment for temporary alimony against him and unless prohibited therefrom will restrain him of his liberty and jail him in contempt proceedings for non-payment of alimony although said Court had and has no jurisdiction whatever of the Vice-Consul and although all of its orders and judgments in said action are null and void.

## THE CONSTITUTIONAL AND STATUTORY PROVISIONS UPON WHICH APPELLANT RELIES.

The appellant relies upon Article III, Section 2 of the Constitution of the United States which provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

and upon Section 256, paragraph 8 of the Judicial Code, (R. S. Sec. 711; Mar. 3, 1911, c. 231, Sec. 256, 36 Stat. 1160; Oct. 6, 1917, c. 97, Sec. 2, 40 Stat. 395; June 10, 1922, c. 216, Sec. 2, 42 Stat. 635; U. S. C. A. Title 28, Sec. 371) which is as follows:

> "The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states. * * *
>
> "(8) In all suits and proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls."

**THE REASONING OF THE SUPREME COURT OF OHIO IN SUSTAINING THE DEMURRER AND DENYING THE WRIT OF PROHIBITION.**

The opinion of the Supreme Court of Ohio upon sustaining the demurrer to the petition for writ of prohibition and denying such writ may be found in the record at pages 8 to 14. (*Ohio Law Bull. and Rep.*, Feb. 4, 1929; 119 O. S. 326.) From the opinion it is apparent that the Supreme Court of Ohio accepted the facts alleged in the petition as we have hereinbefore summarized them and also took into consideration the facts conceded during argument before that Court that Helen Popovici was at the time of the marriage a resident of Stark County, Ohio; that the marriage was contracted and consummated in Canton, Stark County; and that the proceedings in the action for divorce and alimony were regular in all respects except for the official position of the Vice-Consul.

The opinion concedes that under the constitutional and statutory provisions hereinbefore quoted, no ordinary action against the accredited representatives of a foreign government could be validly maintained in state courts. A doubt is suggested as to whether Congress would have the power to confer upon the federal courts exclusive jurisdiction, or any jurisdiction, over causes in which domestic relations are involved. However, the decision is not predicated upon that doubt. The decision is based upon the opinion that Section 256, subparagraph 8 of the United States Judicial Code quoted hereinbefore does not cover actions for divorce and alimony.

That conclusion is reached by reasoning that since this Court has held that the federal courts do not have jurisdiction over causes affecting domestic relations that unless the state courts have jurisdiction of such actions against diplomatic and consular representatives of foreign countries, the wife of such a representative would have no forum

in the United States wherein she could obtain relief. The opinion concludes as follows:

> "The language of paragraph 8 of Section 256 of the United States Judicial Code is in clear language, and yet it must be said that congress has not by that very clear language clearly manifested the legislative intent. The general intent of congress upon this entire subject is manifested by what is done and omitted rather than by what is said. By its omission to make any provision for the trial of divorce and alimony suits against foreign consuls in the federal courts it has manifested an intent and purpose to leave such controversies to the courts of the states."

**THE ERRORS OF THE SUPREME COURT OF OHIO.**

In not following the clear language of paragraph 8 of Section 256 of the United States Judicial Code quoted hereinbefore, the Supreme Court of Ohio, denied appellant the protection given him by the Congress of the United States, and that Court usurped the function of the Congress.

## ARGUMENT.

**THE STATUTE EXCLUDES STATE COURTS FROM JURISDICTION OF ACTIONS FOR DIVORCE AND ALIMONY AGAINST VICE-CONSULS.**

Paragraph 8 of Section 256 of the United States Judicial Code quoted hereinbefore provides that the jurisdiction of the courts of the United States shall be exclusive of the courts of the several states in all suits and proceedings against vice-consuls. Certainly an action for divorce and alimony is a proceeding or suit. There is no more comprehensive term than "all." All means "every."

The opinion of the Supreme Court of Ohio states that the statute "is in clear language" but proceeds to find that the Congress did not mean what it said in such clear lan-

guage. In so finding, the Supreme Court of Ohio usurped the function of the Congress. Courts have no right to presume or to find that a statute does not mean what it says in clear language. The judicial function of interpreting and construing statutes stops short of disregarding clear language. Courts should not look to what the Congress did and omitted in order to ascertain legislative intent when such legislative intent is expressed in the statute in clear language.

Congress no doubt has had and has power to leave to the state courts jurisdiction of a certain class of cases against consuls, or for that matter jurisdiction of all kinds of cases against them. But Congress has acted and has taken jurisdiction of "all" cases from the state courts. Congress did not say it took from the state courts jurisdiction of all cases except those of divorce and alimony. Congress did not say that it took from the state courts jurisdiction of all cases provided we have given a remedy in the federal courts. If it had been so intended Congress would have said so. Such a holding by the courts would be judicial legislation.

The Supreme Court of Ohio in the paragraph of its opinion quoted hereinbefore disregarded its own previous correct statement of law given in its opinion in the case of *The Mahoning Park Company vs. The Warren Home Development Company,* 109 O. S. 358. In that case the Supreme Court of Ohio was asked to construe Section 8310 of the General Code of Ohio, contrary to its plain language. The first paragraph of the syllabus states the law of the case as follows:

> "The character, operation, and extent of a statutory lien must be ascertained from the statute creating and defining it. Such statute cannot be amended or extended by judicial construction to meet a situation not provided for nor contemplated thereby. The remedy is legislative."

In the case just cited, the Ohio Supreme Court was merely affirming and following the vigorous language of Judge Spear, formerly of the same bench, in the case of *Slingluff et al. vs. Weaver et al.*, 66 O. S. 621, which is undoubtedly the law of statutory interpretation in Ohio.

This was an action by taxpayers to enjoin a Village Mayor and Council from granting a franchise to certain persons for the operation of an electric railway. An act of the Legislature of Ohio was relied upon, and the parties differed as to the interpretation of the act. Concerning the meaning of the act and the interpretation of statutes, it is said, in the opinion of Judge Spear for the entire Court, on page 268:

> "Coming to the act itself, it must be apparent to every intelligent reader that, with respect to the question we are considering, there is no ambiguity or doubt as to the natural meaning of the words used. Taking it just as it comes to us from the hand of the lawmaking body, the import of the act is clear and explicit. To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. Plainly then, we are asked to import into the act a doubt as to its meaning and then resort to a change of phraseology, or punctuation, or to an addition of words, or to a rejection of classes of cases enumerated, in order to remove the doubt that we have thus created, a doubt based upon considerations and conjectures *aliunde*. This the court may not do. The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. The question is not so much what did the legislature intend to enact, as what did it mean by what it did enact. The words asked to be incorporated would be the words of the expounders and not of the law-makers."

This Court affirmed without opinion (218 U. S. 357 and 369), the judgment of the Circuit Court in *Ladew vs.*

*Tennessee Copper Company,* 179 Fed. 245. In the opinion of the Circuit Court it is said: (p. 252)

> "The construction and interpretation of statutes cannot extend to amendment or legislation, *U. S. vs. Fish,* 3 Wall. 445, 448, 18 L. Ed. 243; *Petri v. Creelman Lumber Co.,* 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281. Nor can considerations of hardship justify a strained construction of the law as written. *Jos. Schlitz Brewing Co. v. U. S.,* 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; *St. Louis, I. M. & S. R. Co. v. Taylor,* 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. 'The remedy, if any be required, is in Congress.' *Ex-parte Girard,* 3 Wall. Jr., 263, 10 Fed. Cas. 436, Fed. Cas. No. 5,457."

In *Caminetti vs. United States,* 242 U. S., 470 Mr. Justice Day in delivering the opinion construing the Mann Act on page 485 says:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the court is to enforce it according to its terms. *Lake County v. Rollins,* 130 U. S. 662, 670, 671; *Bate Refrigerating Co. v. Sulzberger,* 157 U. S. 1, 33; *United States v. Lexington Mill and Elevator Co.,* 232 U. S. 399, 409; *United States v. Bank,* 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone,* 175 U. S. 414, 421. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

> Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them. * * *"

*Mackenzie vs. Hare et al.*, 239 U. S. 299 (1915). This was an action in mandamus to compel the Board of Elections to allow the plaintiff to register as a qualified voter. She was born and resided in California. In 1909 she married Gordon Mackenzie, a subject of the kingdom of Great Britain. They continued to reside in California, but he never became naturalized and it did not appear that he intended to do so. On March 2, 1907, prior to the marriage of the plaintiff in error, Congress enacted a statute, c. 2534, 34 Stat. 1228, providing:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registration as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

Mr. Justice McKenna in delivering the opinion says on Page 307:

> "Upon the construction of the act it is urged that it was not the intention to deprive an American-born woman, remaining within the jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the act and upon the report of the committee upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, 'that the intention of Congress was solely to legislate concerning the status of citizens *abroad* and the questions arising by reason thereof.' "

"Does the act invite or permit such assistance? Its declaration is general, 'that any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

In *Mulville vs. City of San Diego,* 183 Cal. 734, 192 Pac. 702, the Supreme Court of California was called upon to construe a statute of California relating to the power of municipal corporations and in its opinion (192 Pac. page 704) says:

"In construing a legislative enactment the intent of the Legislature must be determined primarily by attributing the ordinary and popular sense to the words of the statute where they are free from ambiguity and the result is not absurd, and this must be done even though it appear probable that a different object was in the mind of the Legislature. (Citing authorities.)

"A liberal construction does not mean enlargement of the plain provisions of the law." (Citing authorities.)

The Congress of the United States having determined and enacted that the jurisdiction of the Courts of the United States shall be exclusive of the courts of the several states in *all* suits and proceedings against vice-consuls, surely this Court will not hold such determination and

statute absurd. The reasons which prompted the framers of the Constitution to extend the judicial power of the United States to all cases affecting ambassadors and consuls and which prompted the Congress to make the jurisdiction of the courts of the United States in such cases exclusive of the courts of the several states, apply to divorce proceedings against diplomatic and consular representatives just as much as to other suits and proceedings against them. The United States has exclusive responsibility for international relations. A Vice-consul is a representative of a sovereign of equal dignity with the United States. The foreign sovereign thus represented may have peculiar laws relative to domestic relations. No state court should have the power to draw the United States into complications with a foreign sovereign and such complications might result from a divorce proceeding just as readily as from any other kind of a suit or proceeding.

This Court long ago decided that consular representatives are exempt from all suits and proceedings in the state courts. *Davis v. Packard*, 7 Pet. 276 (1834). The decision in that case was under an earlier form of this same statute which only differs from the present statute in that it excepted a few specific criminal matters. It is said in the opinion of this Court in that case: (p. 280)

> "As an abstract question it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls."
>
> (p. 285) "The act of Congress is *general*, extending to *all* suits against consuls."

At page 283 of the opinion the court held that the privilege and immunity is not personal to the consul, but is a privilege of the government which he represents. The Court of Appeals of New York in the *Valario* case cited below, held it is also a privilege of the Government of the United States. It is a privilege which he cannot waive.

The question has been decided by the courts of New York and Pennsylvania contrary to the opinion and decision of the Supreme Court of Ohio in this cause.

In *Higginson v. Higginson*, 158 N. Y. Sup. 92, it was held that under this act of Congress the courts of New York have no jurisdiction over an action for separation brought by the wife of the consul for the Republic of Peru against the consul in a New York court.

The reasons for excluding state courts from jurisdiction over consuls and other representatives of foreign governments is ably stated by the highest court of New York in the case of *Valario v. Thompson*, 7 N. Y., 576, where in the opinion at page 580, it is said:

> "The object of this exclusion was to keep within the control of the federal government, and subject to the authority of its courts, all cases and contingencies which might in any degree affect our foreign relations. The United States Government has an interest in maintaining this exclusive jurisdiction for the purpose of preventing it from being involved in controversies with foreign powers without its consent and for acts not its own. But this is a matter of internal regulation between the general government and the several states, over which foreign governments have no control. The exemption of a consul from liability to be sued in a state court, if it can be called a privilege, is not the privilege of the consul or his government, but of the United States Government; and therefore it cannot be renounced by the consul."

A Pennsylvania court has also held that the state courts of that state have no jurisdiction in suits and proceedings against consuls and vice-consuls. *Mauskardt v. Soderstrom*, 4 Binney 138. We also rely upon:

*Sagory v. Wissman* (D. C. N. Y.) (1868), Fed. Cas. No. 12227;

*Griffin v. Dominguez*, 9 N. Y. *Super.* Ct. (2 Duer) 656 (1853);

*Sartori v. Hamilton*, 13 N. J. Law (L. J. G. Green) 107 (1832);

Opinions of Attorney General of the United States, Vol. 1, page 406, (1820).

Reduced to its final analysis, the Ohio Supreme Court decision causes a situation whereby it means that a foreign consul or vice-consul can not be sued for divorce and alimony in the state courts of New York and Pennsylvania, and can be sued in the state courts of Ohio, an intolerable situation in view of the specific legislation of Congress upon this subject. Thus in the United States there might be forty-eight different kinds of liability for vice-consuls who might marry an American girl, depending upon the state in which they were temporarily located.

This Court has held in the cases cited in the opinion of the Supreme Court of Ohio that Federal Courts have no jurisdiction of suits or proceedings for divorce and alimony between persons of whom the state courts have jurisdiction, but so far as we have been able to find, it has never held that the Federal Courts have no jurisdiction of such suits or proceedings against diplomatic and consular representatives of foreign sovereigns.

June 30, 1927, Helen Popovici filed suit in equity in the District Court, N. D. Ohio, against appellant for divorce and alimony. Motion of appellant to dismiss the petition was sustained on July 15, 1927. (*Popovici v. Popovici*, 20 F. 2d. 185) The district judge held that provisions of the United States Judicial Code, Section 24, paragraph 16 (R. S. Sec. 563, par. 17; Mar. 3, 1911, c. 231, Sec. 24, par. 18; 36 Stat. 1093; U. S. C. A. Title 28, Sec. 41 par. 19) are not sufficiently explicit to warrant his disregard of the

general declarations of this Court that federal courts have no jurisdiction of divorce proceedings. Section 24, paragraph 18 of the *Judicial Code* is:

> "The district courts shall have original jurisdiction as follows:
>
> 18th. Of all suits against consuls and vice consuls."

The opinion of the district judge contains the following paragraph which explains the basis of his decision.

> "True it is that some of these cases involve a consideration of the case where the divorce action is against the consul of a foreign country, nevertheless it cannot be said that this positive language announced in successive cases by the Supreme Court is only to be decisive of the particular case under consideration."

Although the Federal Courts have no jurisdiction of divorce proceedings against diplomatic and consular representatives so that the wife of such a representative has no forum in the United States in which to obtain relief, nevertheless, the courts should not question the wisdom of Congress expressed in such clear language. Hardship does not justify judicial legislation. Perhaps the Congress in its wisdom desired to limit women who marry such aliens to the laws of the foreign sovereign for protection in their marital relations. The Congress may prefer that to international complications.

The Supreme Court of Ohio attached some weight to the fact that the marital contract was with an American woman and consummated in Ohio. That fact improves to no being irrelevant and immaterial. An American woman who marries an alien consul is presumed to have known the law of the land would protect him against litigation in state courts so long as he retained his consular position. If Congress had desired to give relief to an offended wife under such circumstances it undoubtedly would have done so.

## THE STATUTE AS THUS CONSTRUED IS CONSTITUTIONAL.

We recognize the rule of statutory construction that where two constructions are possible and one will render the statute unconstitutional, and the other will make it valid, that construction will be placed upon the statute which will preserve the validity of the Act. But that rule has no place in this action because the statute is susceptible of only one construction.

We also recognize the rule that where two constructions of a statute are possible and one construction would lead to harsh and absurd results, where as the other would be fair and reasonable, that construction will be preferred which will be fair and reasonable. But that rule has no place in this action because first, the statute is not susceptible of two constructions and second, because giving literal effect to its clear language will not be harsh or absurd in view of the evident desire of the Congress to avoid international complications.

Article III, Section 2 of the Constitution of the United States extends the judicial power of the courts of the United States to "*all cases affecting ambassadors, other public ministers and consuls*". Since the decisions of this Court in the case of *Davis v. Packard*, 7 Pet. 276 and in the case of *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, the power of Congress to exclude the courts of the several states from jurisdiction of such cases can not be doubted. There is nothing in the Constitution limiting the power thus conferred upon the Congress by imposing a condition that the courts of the several states shall not be excluded from jurisdiction in such cases unless a remedy is provided in the federal courts. The power of Congress to exclude the courts of the several states from jurisdiction of all suits and proceedings against vice-

consuls is unlimited and not qualified by any condition that the federal courts afford a forum.

The plain language of the statute is in accord with sound international policy and fully authorized by the Constitution.

## CONCLUSION.

Section 256, paragraph 8 of the United States Judicial Code applies to suits and proceedings for divorce and alimony against vice-consuls and is constitutional. The Supreme Court of Ohio erred in denying the writ of prohibition as prayed for by appellant.

WHEREFORE, appellant prays that this Court issue the writ of prohibition as prayed for and that relator be restored to all things he has lost by reason of the error of the Supreme Court of Ohio, including his costs herein.

Respectfully submitted,

MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,
*Counsel for Appellant.*

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OCT 23
CHARLES ELMO

# In the Supreme Court of the United States

**OCTOBER TERM, 1928.**

## No. 35.

THE STATE OF OHIO on the relation of
JOHN C. POPOVICI, Vice Consul of Roumania,
315 Bulkley Bldg., Cleveland, Ohio,
*Appellant,*

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM, EDWIN W. DIEHL,
Judges of the Court of Common Pleas,
Stark County, Canton, Ohio,
*Appellees.*

**BRIEF FOR APPELLEES.**

HENRY W. HARTER, Jr.,
HARRY NUSBAUM,
*Counsel for Appellees.*

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**BRIEF FOR APPELLEES.**

HARRY NUSBAUM,
*Counsel for Appellees.*

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# In the Supreme Court of the United States

**OCTOBER TERM, 1928.**

## No. 35.

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THE STATE OF OHIO on the relation of
JOHN C. PROVOST, Vice Consul of Roumania,
215 Bulkley Bldg., Cleveland, Ohio,

*Appellant,*

vs.

ADAM W. ACKER, CHARLES KRUMHOLTZ, EDWIN W. DOAN,
*Judges of the Court of Common Pleas,*
Stark County, Canton, Ohio,

*Appellees.*

---

## BRIEF FOR APPELLEES.

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### I. STATUS OF FOREIGN CONSULS:

A consul being in a foreign country derives his authority, in effect, from both governments. He receives his commission from the country which he represents and obtains his exequatur from the country to which he is sent. It is, in truth, solely by virtue of the authority vested in him by the country to which he is sent that he is able to exercise his official functions within its territorial limits.

9 R. C. L., 136.

The word "consul" as used in section 236, clearly refers to persons fully endowed with power to act as

sional within the jurisdiction to which they are sent by their government. They are not consuls until they have been recognized as such by the President, usually evidenced by an exequatur, and likewise they cease to be consuls when by his letters patent the President revokes the exequatur.

Consular status does not exist in the absence of the President's recognition of the person accredited by the Foreign State.

*Ravie vs. Citty*, 192 N. Y. S. 577, 579.

This question is one partly political and partly judicial. So far as the question may be political we may consider the opinion of the Secretary of State of the United States as indicating the political status which such a consul may have.

*Ravie vs. Citty*, 196 N. Y. S. 462, 466.

## 4. OPINION OF SECRETARY OF STATE OF UNITED STATES.

COPY

DEPARTMENT OF STATE,
WASHINGTON, D. C.

January 4, 1929.

In reply refer to
811.703/1111-70

Mr. Harry Gudbaum,
Attorney at law,
619 Rockwell Bldg.,
Canton, Ohio.

Sir:

The Department acknowledges the receipt of your letter of December 11, 1927, with reference to the failure of Mr. Popovici, now Vice Consul of Roumania in Cleveland, to provide for the support of his wife and child.

In reply to the questions enumerated in your letter I desire to inform you as follows:

(1) In a note dated November 19, 1926 the Roumanian Minister at Washington informed the Department of the appointment of Mr. Ioan C. Popovici as Roumanian Vice Consul at Cleveland and requested that an exequatur be issued.

(2) As Mr. Popovici's commission of appointment had not been received by the Minister from the Roumanian Government an exequatur was not issued but provisional recognition was accorded Mr. Popovici on December 10, 1926.

(3) In general it may be stated that if a consular officer be guilty of illegal or improper conduct, he is liable to have his exequatur revoked, and, if his conduct is criminal, to be punished according to laws.

(4) It would of course not be proper for this Government to initiate or become a party to legal proceedings in a case of this sort.

Before giving consideration to the action which the Department might take in this matter and which might result in Mr. Popovici's removal from this country, and, consequently, from the jurisdiction of any American court, it is thought that you may care to take such steps as may be provided by the laws of Ohio so that the judgment of the local court may be executed against Mr. Popovici in Cleveland.

I am, Sir,

Your obedient Servant,

For the Secretary of State,

W. R. Castle,

*Assistant Secretary.*

**B. WHERE EXEQUATUR REVOKED, CONSUL NOT ENTITLED TO IMMUNITY AGAINST PROCEDURE IN STATE COURTS:**

A consul duly appointed to the United States by a foreign country, but whose exequatur has been revoked, is not within subdivision (8) of this section, granting immunity against state court proceedings to ambassadors and consuls.

*Savic vs. City of New York,* (1922) 196 N. Y. S. 442, 203 App. Div. 81, affirming (1922) 193 N. Y. S. 577, 118 Misc. Rep. 156.

The immunity granted consuls against proceedings in state courts is granted as a matter of policy, and not because of any treaty. Id.

International law gives consuls and other diplomats no immunity from civil or criminal process. Id.

**C. STATUTE STRICTLY CONSTRUED:**

A foreign diplomatic attache, accredited to another foreign power, cannot, while traveling in this country, claim immunity from service of process or from arrest under Federal Judicial Code, which applies only to those of diplomatic status accredited to United States Government.

*Carbone vs. Carbone,* 206 N. Y. S. 40.

**II. JURISDICTION OF FEDERAL COURTS OVER CAUSES AFFECTING THE DOMESTIC RELATIONS:**

A. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

In Re: *Burns,* 136 U. S., 586, 594, 595, 596;

*Barber vs. Barber,* 21 Howard, 582;

*Johnson vs. Johnson,* 13 Fed. 193;

*Bowman vs. Bowman,* 30 Fed. 849;

*Simms vs. Simms,* 175 U. S. 162;

*De La Roma vs. De La Roma,* 201 U. S. 303.

B. Marriage laws are under the control of the States and are not annulled, or affected by the Civil Rights Bill of Congress or the Fourteenth Amendment to the Constitution of the United States.

IN RE: *Hobbs* case, No. 6550, Fed. cases.

The United States District Court, Northern District of Ohio, Eastern Division, held that neither Article III, Sec. 2, of the Constitution of the United States, nor U. S. J. Code, Sect. 256, par. 8, (Title 28, Sect. 371, U. S. Code, Sect. 1233) granted jurisdiction, in divorce cases, to the Federal Court for we attempted to bring this very action into the Federal Court.

*Popovici vs. Popovici,* 29 Fed. (2nd).

## III. CONSTRUCTION OF STATUTES:

1. In interpreting a statute the intention of the law making power will prevail even against the letter of the statute; a thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter.

*Hawaii vs. Mankichi,* 190 U. S. 197, 23 Sup. Ct. Rep. 787.

2. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

*U. S. vs. Kirby,* 74 U. S., 482;

Citing *Hawaii vs. Mankichi,* 190 U. S. 197, p. 213.

3. The operation of a statute may be restrained within narrower limits than its words import, where it is evident that the literal meaning of its language would extend to cases which the legislature never designed to embrace it.

*Brewer vs. Blougher,* 14 Pet. 178, 39 U. S. Sup. Ct. Rep. 177.

4. There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause great public injury or inconvenience.

*Bird vs. U. S.,* 187 U. S. 118, 23 Sup. Ct. Rep. 42.

5. All laws should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or an absurd consequence.

*Hawaii vs. Mankichi,* 190 U. S. 197, 23 Sup. Ct. Rep. 787.

**CONCLUSION.**

That Appellant was at no time issued an exequatur; that Appellant's status being partly political and partly judicial, and the Secretary of State of the United States, having given an opinion as to the political status of Appellant and having recommended procedure as provided by the Laws of Ohio, and the Statute being one that is strictly construed, it is our contention that Appellant does not come within the provisions of said Statute.

Appellant, in the United States District Court, in the case of *Popovici vs. Popovici,* 29 Fed. (2d) argued most strenuously and successfully that the provisions of Article III, Sec. 2, of the United States Constitution, and United States Judicial Code, Sec. 256, paragraph 8, (Title 28, Sect. 371, U. S. Code, Sect. 1233) did not give the Federal

Court jurisdiction in divorce cases, and that Federal Courts could not be turned into divorce courts or courts of domestic relations, and succeeded in obtaining the dismissal of this very divorce case from the Federal Courts. Now, contrary to their contention in the Federal Court, they have placed themselves in the anomalous position of asking this Court to reverse and declare void the findings of the Federal Court, and to place a construction upon said Section which would render the same ineffective, inefficient and work a grave public injury; and probably convert Federal Courts into courts of domestic relations.

WHEREFORE, APPELLEES pray that this Court deny the Writ of Prohibition prayed for, including their costs herein.

Respectfully submitted,

HARRY NUSBAUM,

*Counsel for Appellees.*

# SUPREME COURT OF THE UNITED STATES.

No. 35.—October Term, 1929.

| | |
|---|---|
| The State of Ohio, on the Relation of John C. Popovici, Vice-Consul of Roumania, Petitioner, *vs.* Abram W. Agler, Charles Krichbaum, and Edwin W. Diehl, Judges of the Court of Common Pleas of Stark County, Ohio. | On Writ of Certiorari to the Supreme Court of the State of Ohio. |

[January 20, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

The relator was sued for divorce and alimony in a Court of the State of Ohio. He objected to the jurisdiction of the Court, but the objection was overruled and an order for temporary alimony was made. He thereupon applied to the Supreme Court of the State for a writ of prohibition, but upon demurrer to the petition the writ was denied. 119 Ohio State, 484. A writ of certiorari was granted by this Court.

The facts alleged are that the relator is Vice-Consul of Roumania and a citizen of that country, stationed and now residing at Cleveland, Ohio, and it is said by the Supreme Court to have been conceded at the argument that he was married to Helen Popovici, the plaintiff in the original suit, in Stark County, Ohio, where she resided. The relator invokes Article III, Section 2, of the Constitution: "The Judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls." "In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original jurisdiction"; and also the Judicial Code, (Act of March 3, 1911, c. 231) § 256, "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States, . . . Eighth. Of

all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls." To this may be added § 24 giving to the District Court original jurisdiction "Eighteenth. Of all suits against consuls and vice-consuls"; the Supreme Court, by § 233, being given "exclusively all such jurisdiction of suits and proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations."

The language so far as it affects the present case is pretty sweeping, but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. It has been understood that, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States", *Ex parte Burrus*, 136 U. S. 586, 593, 594, and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. *Barber* v. *Barber*, 21 How. 582. *Simms* v. *Simms*, 175 U. S. 162, 167. *De La Rama* v. *De La Rama*, 201 U. S. 303, 307. A suit for divorce between the present parties brought in the District Court of the United States was dismissed. *Popovici* v. *Popovici*, 30 Fed. (2d) 185.

The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. *Plaquemine Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.

It is true that there may be objections of policy to one of our States intermeddling with the domestic relations of an official and

subject of a foreign power that conceivably might regard jurisdiction as determined by nationality and not by domicil. But on the other hand if, as seems likely, the wife was an American citizen, probably she remained one notwithstanding her marriage. Act of September 22, 1922, c. 411, § 2; 42 Stat. 1021, 1022. Her position certainly is not less to be considered than her husband's, and at all events these considerations are not for us.

In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go.

*Judgment affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*